

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)
Complaint Against)
TIM DOWELL)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Roger Somerville, the incumbent representative and a candidate for reelection in House District 78 in the 1996 general election, filed a complaint against his opponent in the election, Tim Dowell. The complaint alleges that Mr. Dowell violated Mont. Code Ann. § 13-37-131 by misrepresenting Rep. Somerville's voting record in a campaign flier.

SUMMARY OF FACTS

1. Rep. Somerville and Mr. Dowell were opposing candidates for the legislative seat in House District 78 in the November 1996 general election.

2. A campaign flier in support of Mr. Dowell's candidacy was distributed the week before the election. Rep. Somerville alleges that the following language in the campaign flier misrepresents his voting record:

Roger Somerville voted for SB 225 which would allow the sale of state lands to private interests. (Somerville vote on 2nd & 3rd reading, SB 225)

Rep. Somerville contends that Senate Bill (SB) 225 never came up for a vote on the floor of the House, and that he therefore did not vote for the bill, as claimed in the flier.

3. SB 225, introduced on January 23, 1995, sought to require the sale of certain State lands in Daniels, Valley, Garfield, and

Phillips Counties. The bill was referred to the Senate Committee on Natural Resources, and a hearing was held on February 6, 1995. The bill was transmitted to the House and referred to the House Committee on Natural Resources. A hearing was held on March 8, 1995, but the bill was tabled in committee and died on March 16, 1995.

4. Rep. Somerville was not a member of the House Committee on Natural Resources. In addition, SB 225 did not make it to the floor of the House for a vote. Rep. Somerville therefore never had an opportunity to vote on SB 225.

5. Mr. Dowell was contacted, and referred all inquiries to his attorney. According to Mr. Dowell's attorney, the campaign flier was put together for Mr. Dowell by Peter Parisot, an employee of the Montana Democratic Party in Missoula. Mr. Parisot had prepared campaign literature for Mr. Dowell in the past, and Mr. Dowell relied on Mr. Parisot's representation that the information in the flier was accurate.

6. Peter Parisot is represented by the same attorney representing Mr. Dowell. An interview with Mr. Parisot was arranged through his attorney. Mr. Parisot was working for the Montana Democratic Party in Missoula at the time of this incident, and had previously prepared political ads for Mr. Dowell. During a meeting with Mr. Dowell during the last week of the campaign, Mr. Dowell requested that Mr. Parisot investigate Rep. Somerville's position on the state lands issue, as well as other issues that Mr.

Dowell felt were important to voters in the Flathead area, for the purpose of putting together a campaign flier.

7. Mr. Parisot stated that the last week of the campaign was an extremely busy time. In an effort to complete all his projects he mistakenly reported to Mr. Dowell voting information regarding SB 288 rather than SB 225.

8. Mr. Parisot obtained the voting record information from the MONTCEL voter's guide. On page 48 of the guide, beginning in the top right hand column, is a description of SB 225, followed by the notation:

Vote record: 3rd Reading vote used in the Senate. A "-" indicates a vote **for** SB 225 and a "+" indicates a vote **against**.

Immediately following this notation, on the same page and in the same column as the description of SB 225, is a description of SB 288, which amended a portion of the Montana Environmental Policy Act. Following that description is the following notation:

Vote record: 3rd Reading votes used in the Senate and in the House. A "-" indicates a vote **for** SB 288 and a "+" indicates a vote **against**.

After reading the descriptions of SB's 225 and 288 on page 48 of the MONTCEL voter's guide, Mr. Parisot then reviewed the voting records on 12 House and Senate bills for Rep. Somerville and a number of other House members contained on page 52 of the voter's guide. Those records list a "-" vote for Rep. Somerville on SB 288, which indicates a vote in favor of that bill. There are no votes listed for SB 225 on that page of the MONTCEL voter's guide. Mr. Parisot reported to Mr. Dowell information regarding Rep.

Somerville's vote on SB 288, but he represented it as Rep. Somerville's vote on SB 225.

9. Mr. Parisot stated that he didn't know the information he provided to Mr. Dowell was erroneous until after the complaint was filed by Rep. Somerville. Mr. Dowell telephoned Mr. Parisot and inquired about the accuracy of the information. Mr. Parisot initially responded that the information he had provided regarding Rep. Somerville's voting record was accurate, but when he rechecked the MONTCEL voter's guide he discovered the error. Mr. Parisot stated that it was an honest mistake and he meant no harm.

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-37-131 provides:

Misrepresentation of voting record -- political civil libel. (1) It is unlawful for a person to willfully or negligently make or publish a false statement about a candidate's public voting record or to make or publish a false statement that reflects unfavorably upon a candidate's character or morality.

(2) It is unlawful for a person to willfully or negligently provide false information to a candidate concerning another candidate's public voting record when the person knows or should know that the information will be made public during the course of a campaign.

(3) For the purposes of this section, the public voting record of a candidate who was previously a member of the legislature includes a vote of that candidate recorded in committee minutes or in journals of the senate or the house of representatives. Failure of a person to verify a public voting record is evidence of the person's willful or negligent conduct if the statement made by the person or the information provided to the candidate is false.

(4) A person violating subsection (1) or (2) is liable in a civil action brought by the commissioner or county attorney pursuant to 13-37-124 for an amount up to \$1,000. An action pursuant to this section is subject to the provisions of 13-37-129 and 13-37-130. [Emphasis added].

Mont. Code Ann. § 1-1-204 defines negligent and willful acts as follows:

Terms denoting state of mind. Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

. . . .

(4) "Neglect", "negligence", "negligent", and "negligently" denote a want of the attention to the nature or probable consequences of the act or omission that a prudent man would ordinarily give in acting in his own concerns.

(5) "Willfully", when applied to the intent with which an act is done or omitted, denotes a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law, to injure another, or to acquire any advantage.

Applying these statutory provisions, there is insufficient evidence that Mr. Dowell willfully or negligently published a false statement regarding Rep. Somerville's voting record. Mr. Dowell relied on information obtained and provided by Mr. Parisot, and apparently did not conduct any independent research. It is not unreasonable for a candidate for public office to rely on information provided by consultants or political parties for the preparation of campaign literature.

There is also no evidence that Mr. Parisot willfully provided false information to Mr. Dowell regarding Rep. Somerville's voting record. There is, however, evidence that Mr. Parisot negligently provided false information to Mr. Dowell, knowing that the information would be made public during the course of the campaign. Mont. Code Ann. § 13-37-131(2).

Mr. Parisot explained the error as an honest mistake. However, an inadvertent act can constitute a negligent act if,

under the circumstances, it amounts to a failure to exercise reasonable care. Mr. Parisot was aware, from his conversations with Mr. Dowell, that the issue embodied in SB 225 was a significant issue in the election. Given the importance of the issue, he should have exercised greater care when attempting to ascertain the voting records of Rep. Somerville. The descriptions of SB 225 and SB 288 are clearly set forth in the MONTCEL guide. While both bills are described on page 48 of the guide, there is no listing of votes on SB 225 on page 52 of the guide. It is therefore difficult to understand how Mr. Parisot mistakenly believed that Rep. Somerville's voting record on SB 288 instead constituted his voting record on SB 225. Mr. Parisot should have taken greater care to confirm that the voting record information was accurate prior to providing it to Mr. Dowell.

Counsel for Mr. Dowell and Mr. Parisot argues that there can be no violation of Mont. Code Ann. § 13-37-131 for a negligent act. Since Rep. Somerville is a public figure, he argues, there can be no liability for statements regarding Rep. Somerville unless such statements are made with malice, apparently relying on New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

In Sullivan the United States Supreme Court held that a public official can recover damages from the media for libel only upon proof that he had been libeled knowingly or with reckless disregard for the truth. Libel law has historically been concerned with ensuring that a person's reputation is not seriously diminished.

For example, in Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 511 (1991), the Supreme Court stated:

We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, . . . [Emphasis added].

Mont. Code Ann. § 13-37-131's prohibition against the misrepresentation of a candidate's voting record has nothing to do with protecting a public official's reputation, thus traditional concepts regarding libel are not applicable in this case.

Moreover, the rule established in Sullivan applies to actions for damages brought by the allegedly defamed public official:

The constitutional guarantees [First and Fourteenth Amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [Emphasis added].

Sullivan, 376 U.S. at 279-80. The Court summed up its holding as follows:

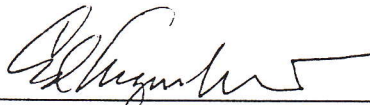
We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. [Emphasis added].

Mont. Code Ann. § 13-37-131 does not permit the candidate (Rep. Somerville) to recover money damages for an alleged misrepresentation of his voting record, but instead authorizes the State to seek a civil penalty from the person who makes the misrepresentation. The State has a legitimate interest in protecting the integrity of the election process by requiring that in political races the voting records of candidates are not

misrepresented, either intentionally or negligently. Mont. Code Ann. § 13-37-131 implements that legitimate State interest. The Supreme Court's ruling in Sullivan does not affect the State's ability to enforce this statute by seeking a civil penalty when there is evidence of a negligent violation.

Based on these findings the matter will be referred to the county attorney for his review and possible exercise of prosecutorial discretion, pursuant to Mont. Code Ann. § 13-37-124.

DATED this 9th day of December, 1996.



ED ARGENBRIGHT

Commissioner of Political Practices